United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1014

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P/S

To be argued by
VICTOR J. ROCCO

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1014

UNITED STATES OF AMERICA,

Appellee,

—against—

EDWIN GONZALEZ,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1014

UNITED STATES OF AMERICA,

Appellee,

—against—

EDWIN GONZALEZ,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Edwin Gonzalez appeals from an order denying a motion to withdraw his guilty plea and subsequent judgment of the United States District Court for the Eastern District of New York (Judd, *J.*), entered December 19, 1975, convicting appellant, on his plea of guilty to two counts of a six count indictment, of possession of cocaine with intent to distribute, 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2, and distribution of the same, 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2, arising out of the sale of approximately two ounces of cocaine to an undercover agent of the Drug Enforcement Administration on March 21, 1975. Pursuant to the judgment of conviction appellant was sentenced to four years imprisonment plus a five year special parole term to run concurrently on counts 1 and 2. Appellant has been admitted to bail pending determination of this appeal.

On this appeal, appellant assigns error to the judgment of the district court and urges that the conviction be reversed and underlying plea vacated, or, in the alternative, that he be afforded a hearing on factual issues purportedly raised on the motion to withdraw. Specifically, he assails the judgment and underlying order on the ground that the district court abused its discretion in denying the motion to withdraw the plea without a hearing despite an asserted entrapment defense and claim that the appellant had been misinformed by prior counsel as to the consequences attending a guilty verdict. As an independent ground for relief, appellant challenges the sentence of the district court as excessive and asks that sentence be reduced in the interest of justice.

Statement of the Case

A. Background

On August 18, 1975, an indictment was returned by the Grand Jury sitting in the Eastern District of New York charging appellant in four counts of a six count indictment with possession of cocaine with intent to distribute (two counts) in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 and distribution of cocaine (two counts) in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. Named as co-defendants on six counts and two counts of the indictment respectively were appellant's brothers, Ramon Gonzalez and Julio Gonzalez.[1] On

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[1] The charges set forth in the indictment arise out of the alleged sale of 52.46 grams, 26.98 grams and 126.88 grams of cocaine to undercover agents of the Drug Enforcement Administration ("D.E.A.") on March 21, 1975, May 5, 1975 and June 3, 1975, respectively. The first two counts of the indictment charge each of the Gonzalez brothers, the middle counts charge Edwin and Ramon and the last two counts name Ramon alone.

August 28, 1975, appellant and the co-defendants entered pleas of not guilty to the indictment before the Honorable Orrin G. Judd and the trial date was scheduled by the court for October 20, 1975.

After successive requests for adjournments by retained counsel for appellant, trial before the court sitting with a jury commenced on October 29, 1975. A brief hearing on defense motions to suppress certain admissions by appellant and Ramon Gonzalez preceded commencement of the trial proper. The motions were denied (GA 39-40).[2] At trial, the government called as its first witness Special Agent Samuel Blackburn of the Drug Enforcement Administration ("D.E.A.") who, on direct examination, testified to events leading up to and attending his purchase of approximately two ounces of cocaine from Edwin Gonzalez on March 21, 1975.

Agent Blackburn testified that he was introduced to appellant on January 27, 1975 for the purpose of purchasing cocaine (GA 52-53) and met with him again for that purpose on March 21, 1975. Agent Blackburn identified appellant and his co-defendants (GA 53, 60, 76), briefly described his undercover discussions with Edwin Gonzalez and Julio Gonzalez on the evening of March 21, 1975 (GA 56, 60-61) and detailed the respective roles in the transaction of the Gonzalez brothers and an unidentified Spanish male. (GA 72-81). The sale was negotiated by appellant, who produced the package (GA 77, 79), asked Agent Blackburn to examine its contents (GA 77), set the purchase price of $2200.00, accepted payment (GA 82-84) and discussed the prospect of future transactions.

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[2] Appellant did not see fit to order the trial transcript in this case or to include relevant portions of it in his appendix. We have endeavored to reproduce in the Government's Appendix relevant excerpts from the trial. Accordingly, page references preceded by "GA" refer to pages in the Government's Appendix; "AA" refers to pages in the Appendix for Appellant.

(GA 83). A field test of the contents of the package purchased from appellant and conducted shortly after the transaction by agents participating in the investigation indicated the presence of cocaine. (GA 34).

The rigorous cross-examination by appellant's trial counsel that followed and continued into the second day of trial (Tr. 141-150, Tr. 2A-58A) focused on events preceding and attending the sale, the role of the informant in arranging the meeting between appellant and the undercover agent (Tr. 12A-18A) the informant's criminal background and possible motivation to "make" cases at the instance of the Drug Enforcement Administration. (Tr. 6A-12A).[3]

Following the testimony of Agent Blackburn, a second undercover agent, Special Agent Gerald Carr, was called to testify concerning his dealings with Edwin Gonzalez and his brothers in April of 1975. Agent Carr identified appellant, Julio Gonzalez and Ramon Gonzalez (GA 28, 30, 31-32) and detailed for the jury his negotiations with the Gonzalez brothers in connection with an attempted purchase of two ounces of cocaine on April 28, 1975. (GA 33-36). Those negotiations aborted when appellant, suspecting that he and his brother Ramon were dealing with a policeman, refused to deal directly with the undercover agent. (GA 35-36). At that point the witnesses' testimony was interrupted by a luncheon recess called by the court.

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[3] Appellant apparently intended to testify in his own behalf and to call the informant, Enrique Bermudez, as a witness for the defense. (GA 44). Indeed, Mr. Bermudez, was made available by the government during trial for service of process (GA 37-38) when, after Judge Judd advised him of his rights, he refused to be interviewed by the defense. (AA 46a-48a).

B. The guilty pleas

At the end of the luncheon recess, trial counsel for each of the defendants approached the Assistant United States Attorney trying the case and inquired whether plea dispositions were available. (AA 80a). Apprised of the government's amenability to a disposition on less than all the counts of the indictment, trial counsel for the appellant requested an adjournment for the purpose of permitting defense counsel to pursue the possibility of guilty pleas with their respective clients. (AA 61a). Following the adjournment, during which time appellant and his co-defendants conferred with counsel, the court was advised that a disposition had been agreed upon between the parties and that the defendants, each of them, were prepared to plead guilty to one or more counts of the indictment. (AA 63a).

Ramon Gonzalez, after a careful inquiry by the court, indicated that he understood the nature of the charges against him, his right to proceed with the trial then underway if he so desired (AA 64a) and the consequences of the plea of guilty. *Id.* In response to the court's inquiry, Ramon Gonzalez admitted knowingly possessing and selling an eighth kilogram of cocaine to an undercover agent of the Drug Enforcement Administration in June of 1975. (AA 65a). At the conclusion of the court's allocution, Ramon Gonzalez was permitted to enter a plea of guilty to counts five and six in satisfaction of the entire indictment. (AA 66a).

Appellant Edwin Gonzalez, who likewise acknowledged that he understood the nature of the charges against him (AA 69a), his right to proceed with the trial then in progress (AA 68a-69a, 71a) and the consequences of the guilty plea, admitted to selling two ounces of cocaine to an undercover agent in March of 1975. (AA 70a). Satisfied that the plea was an informed and voluntary decision and that a factual basis existed for its acceptance,

the court accepted Edwin Gonzalez's plea of guilty to the first two counts of the indictment. (AA 71a).

The court's Rule 11 inquiry preceding the guilty plea of Julio Gonzalez was equally thorough. Advised of his rights by the court (AA 73a, 74a, 75a, 76a, 83a, 85a), Julio Gonzalez indicated his desire to enter a plea of guilty in the face of the evidence against him and, ostensibly, to help his brothers who had pleaded to certain counts in satisfaction of the indictment (AA 83a)[4] but continued to profess his innocence. (AA 73a). An extended colloquy followed during which the court advised Julio Gonzalez that his brothers' pleas would not be reopened (AA 82a, 121a) and, consequently, he did not have to plead guilty to protect them. (AA 76a, 121a-122a). Concerned about accepting a plea without admissions, the court nonetheless allowed the plea pursuant to *North Carolina* v. *Alford*, 400 U.S. 25 (1970), as an independent, voluntary and intelligent choice in the face of clear evidence of guilt, entered for the purpose of limiting the possible penalty attending conviction. (AA 85a, 122a). Sentence was deferred in each instance pending preparation of a presentence report.

On December 2, 1975, prior to the imposition of sentence, a letter application on behalf of appellant requesting leave to withdraw the guilty plea was submitted by newly retained counsel. (AA 57a). In support of the

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[4] The agreement between the Assistant United States Attorney and defense counsel proceeded initially on the assumption that each of the defendants would plead guilty to one or more counts of the indictment. When it became apparent that the court might have difficulty in accepting the plea of Julio Gonzalez absent the usual factual admissions, counsel for the government requested that the court proceed first with Julio's plea. (AA 82a, 122a). The court refused to accede to the government's request; and to insure that the pleas were "independent", postponed Julio Gonzalez's plea to the end. *But see United States* v. *Carlino*, 400 F.2d 56 (2d Cir. 1968), *cert. denied*, 394 U.S. 1013 (1969); *United States ex rel. Cunningham* v. *Follette*, 397 F.2d 143 (2d Cir. 1968).

application, appellant claimed to have been advised by prior counsel that unless he pleaded guilty he would receive twenty to twenty-five years imprisonment; and, under the circumstances, appellant's "plea was entered only in the fear that he would, in fact, be subjected to such a severe penalty and not due to his belief in his own legal guilt." (AA 57a). Apparently as an independent basis for the requested relief, the letter sets forth an entrapment defense.

On December 19, 1975, Judge Judd denied the motion to withdraw the plea on the ground that the stated bases for the motion, even if credited, were clearly insufficient to support the requested relief: the entrapment defense was available during the trial then in progress [5] and trial counsel's appraisal of the jeopardy attending a guilty verdict was not unreasonable in light of the charges. The court determined that there were no factual issues presented on the application that would warrant an evidentiary hearing; and, under the circumstances, based on the recorded responses to the Rule 11 inquiry, appellant's decision to withdraw the plea of not guilty, and plead guilty to the first two counts of the indictment was a counseled choice made with a full understanding of the seriousness of the act and knowledge of its consequences. (AA 96a).[6] The sentence of the court followed.[7]

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[5] In light of the nature of the cross-examination at trial of the government's principal witness by counsel for the appellant (GA 7-9) and his co-defendants (GA 13-20) and the opening remarks of defense counsel (GA 99) a claimed entrapment or other variation of governmental misconduct was likely to constitute a major part of the defense.

[6] Judge Judd subsequently denied a similar motion to withdraw the plea of guilty made on behalf of Julio Gonzalez.

[7] Defendant Julio Gonzalez was sentenced on his guilty plea to count one of the indictment to one year and one day plus a three year special parole term (AA 123a); Ramon Gonzalez was committed to the custody of the Attorney General for study and report pursuant to 18 U.S.C. § 4208(b). (AA 130a).

ARGUMENT

POINT I

The district court properly denied appellant's motion to withdraw his plea.

Appellant contends, in substance, that the district court abused its discretion in denying the motion to withdraw his guilty plea prior to the imposition of sentence or, at the very least, erred in refusing appellant an evidentiary hearing on purported factual issues raised on the application to withdraw the plea. Since appellant's plea constituted a knowing, voluntary and intelligent act made with sufficient awareness of the relevant circumstances and appreciation of the likely consequences, the trial court's denial of the motion to withdraw was a proper exercise of its discretion. Under the circumstances, since the grounds tendered below in support of appellant's motion to withdraw were not controverted or, where controverted, were properly resolved on the face of the plea record, an evidentiary hearing to determine claimed issues of fact was plainly unnecessary. The order and judgment appealed from should be affirmed.

Rule 32(d) of the Federal Rules of Criminal Procedure ("Fed.R.Crim.Proc.") permits post sentence withdrawal of a guilty plea only to prevent "manifest injustice." [8] There is no statutorily defined standard for like motions brought on prior to imposition of sentence.

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[8] Federal Rules of Criminal Procedure 32(d) provides:

Withdrawal of plea of guilty. A motion to withdraw a plea of guilty or *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

United States v. *Barker*, 514 F.2d 208, 218 (D.C. Cir. 1975), *cert. denied*, — U.S. —, 43 U.S.L.W. 3644 (June 9, 1975). Federal courts, following the lead of *Kercheval* v. *United States*, 274 U.S. 220 (1927), have uniformly ruled that even prior to sentence there is no absolute right to withdraw a guilty plea and before a defendant will prevail on a presentence motion to withdraw, it is his burden to show that the granting of the motion would be fair and just. See, e.g. *United States* v. *Giuliano*, 348 F.2d 217 (2d Cir.), *cert. denied*, 382 U.S. 939 (1965); *United States* v. *Marshall*, 510 F.2d 792 (D.C. Cir. 1975); *United States* v. *DeCavalcante*, 449 F.2d 139 (3rd Cir. 1971); *United States* v. *Simmons*, 497 F.2d 177 (5th Cir.), *cert. denied*, 419 U.S. 1048 (1974); *United States* v. *Arredondo*, 447 F.2d 976 (5th Cir. 1971), *cert. denied*, 404 U.S. 1026 (1972). The determination of whether that burden has been satisfied rests within the sound discretion of the trial judge (*United States* v. *Eucker*, — F.2d — [2d Cir., March 8, 1976], slip op. 2459), whose decision is reversible only if clearly erroneous. *United States* v. *Giuliano*, *supra*, 348 F.2d at 221, *citing*, *United States* v. *Hughes*, 325 F.2d 789 (2d Cir.), *cert. denied*, 377 U.S. 907 (1964); see also *United States* v. *Barker*, *supra*, 514 F.2d at 219; *United States* v. *Webster*, 468 F.2d 769, (9th Cir. 1972), *cert. denied*, 410 U.S. 934 (1973).

Of course, whether "fair and just" grounds have been proffered in support of the motion to withdraw a guilty plea must depend upon facts and circumstances of each case. *United States* v. *Barker*, *supra*, 514 F.2d at 220. To be considered in determining whether the motion should be granted is whether the defendant has asserted his innocence (*United States* v. *Hughes*, *supra*, 325 F.2d 789; *United States* v. *Joslin*, 434 F.2d 526, 530 [D.C. Cir. 1970]); the dispatch with which the application is made (*Kadwell* v. *United States*, 315 F.2d 667 [9th Cir. 1963]); and lack of substantial prejudice to the government (*United States* v. *Lombardozzi*, 436 F.2d 878 [2d Cir], *cert. de-*

nied, 402 U.S. 908 [1971]). No single factor is dispositive; and, in the end, a denial of a motion to withdraw a plea will constitute reversible abuse of discretion only where the plea, on the facts before the trial judge, cannot survive collateral attack. *United States* v. *Pisacano*, 459 F.2d 259 (2d Cir. 1972), *judgment vacated*, 417 U.S. 903 (1974); *United States* v. *Lombardozzi*, *supra*, 436 F.2d 878; *United States* v. *Giuliano*, *supra*, 348 F.2d at 222.

The question whether the denial of a motion to withdraw a guilty plea constitutes an abuse of discretion thus reduces to whether the plea was entered unconstitutionally or contrary to Rule 11 strictures or was a knowing and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences. *United States* v. *Pisacano*, *supra*, 459 F.2d at 262; *United States* v. *Barker*, *supra*, 514 F.2d at 221; *United States* v. *DeCavalcante*, *supra*, 449 F.2d at 141. See *McCarthy* v. *United States*, 394 U.S. 459 (1969). Measured by that standard, the order and judgment appealed from should be affirmed.

Nothing advanced by appellant below in support of his claim or urged on appeal to this court suggests that the plea was improper; indeed, appellant has failed to tender any basis whatsoever for withdrawal of the plea. As the plea record indicates, at the time Edwin Gonzalez entered his plea of guilty, he did so voluntarily and intelligently with a full understanding of his rights and the consequences of his act. (AA 97a). Throughout the course of the proceedings against him, appellant was separately represented by competent retained counsel who had conferred at length with his client immediately prior to entry of the plea. (AA 61a-62a, 68a, 90a). Entry of the plea followed a cautious *voir dire* by the court (see *McCarthy* v. *United States*, *supra*, 394 U.S. 459) and was attended by an unequivocal admission of guilt. (AA 70a). That

the plea was entered on the second day of trial and in the face of strong evidence of guilt on the first two counts of the indictment belies any claim that it was ill-considered or offered in haste. See *United States* v. *Barker*, *supra*, 514 F.2d at 222.

Among the grounds advanced by appellant in support of the motion to withdraw is the claim that retained trial counsel had represented that appellant and his brothers would receive between twenty to twenty-five years imprisonment if the matter was to proceed to verdict; a representation which appellant now assails as unrealistic. It was this representation, or so the argument goes, and not appellant's belief in his guilt that induced the plea. As the trial court carefully explained during the plea allocution, however, Edwin Gonzalez, if convicted, actually faced a maximum of fifteen years imprisonment on each of the four counts against him. Assuming that sentence on each count was consecutively imposed by the court, appellant thus faced up to sixty years imprisonment plus a substantial fine. *Cf. United States* v. *Valot*, 481 F.2d 22, 27-28 (2d Cir. 1973). Under the circumstances, it is difficult to understand precisely how counsel's sentence prediction [9] on a verdict could be assailed as unreasonably severe or, for that matter, how appellant could claim to have been misled by his attorney's representations.[10]

The thrust of the argument seems to be that the plea is infirm because it was entered "only in the fear that . . . [appellant] would in fact be subjected to such severe

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[9] For purposes of the motion to withdraw the alleged representation by trial counsel, though uncorroborated, was apparently accepted as true. (AA 96a).

[10] Assuming imposition of consecutive sentences, Ramon Gonzalez, named on all six counts of the indictment, could have been sentenced to ninety years imprisonment while Julio Gonzalez faced a maximum sentence of thirty years on the two counts naming him a defendant.

penalty and not due to his belief in his own legal guilt." (AA 57a). But a guilty plea, especially one entered during trial, is typically motivated by the defendant's desire to accept the probability of a lesser penalty than might otherwise be imposed if there were a guilty verdict. To the defendant, especially one who has been afforded the opportunity to assay the evidence against him, the advantages of a guilty plea are apparent: his exposure is reduced and the practical and financial burdens of a full trial are eliminated. The precise claim that the plea is coerced and invalid if motivated by the fear of a harsher penalty if the conviction follows trial was considered and rejected by the Supreme Court in *Brady* v. *United States*, 397 U.S. 742 (1970):

> The State to some degree encourages pleas of guilty at every important step in the criminal process. For some people, their breach of a State's law is alone sufficient reason for surrendering themselves and accepting punishment. For others, apprehension and charge, both threatening acts by the Government, jar them into admitting their guilt. In still other cases, the post-indictment accumulation of evidence may convince the defendant and his counsel that a trial is not worth the agony and expense to the defendant and his family. All these pleas of guilty are valid in spite of the State's responsibility for some of the factors motivating the pleas; the pleas are no more improperly compelled than is the decision by a defendant at the close of the State's evidence at trial that he must take the stand or face certain conviction. *Id.* at 750.

Indeed, it is precisely because of desire to limit exposure that so long as a factual basis for the plea exists, a court may accept such a "tactical" plea even from a

defendant who continues to assert his innocence. *North Carolina* v. *Alford*, 400 U.S. 25 (1970). Manifestly, such a defendant does not retain the right automatically to withdraw his plea.

Even assuming that trial counsel's assessment of the possible serious consequences attending a guilty verdict was mistaken, such an erroneous sentence estimate should not render an intervening guilty plea involuntary and susceptible to collateral attack. Where a defendant pleads guilty in the belief that he will receive light sentence but in fact receives a heavy one, even if the plea is induced by an erroneous sentence estimate made by defense counsel, the plea is not involuntary and will not be set aside.[11] See *United States ex rel. Bullock* v. *Warden, Westfield St. Farm*, 408 F.2d 1326, 1330 (2d Cir. 1969), *cert. denied*, 396 U.S. 1043 (1970); *United States ex rel. Scott* v. *Mancusi*, 429 F.2d 104, 108 (2d Cir. 1970), *cert. denied*, 402 U.S. 909 (1971). To the extent that defense counsel's prediction as to the consequences of a guilty verdict may be relevant to an informed decision by the de-

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[11] To be distinguished are situations involving flat misrepresentations, as where sentence commitments are falsely attributed to the trial judge or counsel fails to advise his client properly on the maximum or minimum sentence on the plea. In those instances, where the defendant sustains his burden of showing that the circumstances measured by objective standards reasonably justified his mistaken belief that such a commitment has been made or the maximum or minimum sentence such, the plea must be vacated as a violation of the defendant's constitutional right to due process of law and, perhaps, effective assistance of counsel. *Mosher* v. *LaVallee*, 351 F. Supp. 1101 (S.D.N.Y. 1972), *aff'd*, 491 F.2d 1346 (2d Cir.), *cert. denied*, 416 U.S. 906 (1974); *United States ex rel. Hill* v. *Ternullo*, 510 F.2d 844 (2d Cir. 1975); *United States ex rel. Leeson* v. *Damon*, 496 F.2d 718 (2d Cir.), *cert. denied*, 419 U.S. 954 (1974). See *United States* v. *Simpson*, 436 F.2d 162 (D.C. Cir. 1970); *Ross* v. *Wainwright*, 451 F.2d 298 (5th Cir. 1971), *cert. denied*, 409 U.S. 884 (1972).

fendant to plea guilty, it follows that the rule should be the same; indeed, unlike the situation that obtains where the prediction refers to the consequences of a plea, where the sentence estimate refers to a guilty verdict, because of the intervening plea, it is not verifiably erroneous.[12]

Appellant further argues that the trial court erred in refusing to permit him to withdraw his guilty plea in the face of a claimed entrapment defense to the charges. But the law within and among the various circuits is clear; and, an allegation of innocence or assertion of a legally cognizable defense, even with a showing of no prejudice to the government, does not necessarily entitle a defendant to withdraw his plea. *United States* v. *Needles*, 472 F.2d 652 (2d Cir. 1973); *United States* v. *Giuliano*, *supra*, 348 F.2d at 222; *United States* v. *Hughes*, *supra*, 348 F.2d at 792; see also, *United States* v. *Barker*, *supra*, 514 F.2d at 221; *United States* v. *Webster*, *supra*, 468 F.2d at 771. Were the standard otherwise, since there are few if any cases in which a defendant could not devise some theory of innocence, withdrawal would be an automatic right and the defendant permitted simply to alter his tactics and present his theory of the case to the jury. *United States* v. *Barker*, *supra*, 514 F.2d at 221.

If a guilty plea can be withdrawn merely because the defendant now prefers the opportunity to prove his innocence the plea itself is reduced to a meaningless formality and the elaborate protections fashioned by Congress

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[12] The claim that trial counsel's sentence prediction on a guilty verdict may render a subsequent guilty plea involuntary seems a novel one; and no supportive authority has been cited to this Court on the question. An argument, however, can be made that it is the strength of the prosecutor's case and the prospect of leniency—often in the form of a sentence prediction—that are the relevant inducements to entry of a guilty plea. Cf. *Brady* v. *United States*, *supra*, 397 U.S. at 749.

and the courts to precede its acceptance relegated to an arid ritual. "In fact, however, a guilty plea is no such trifle, but 'a grave and solemn act' which 'is accepted only with care and discernment.'" *United States* v. *Barker*, *supra*, 514 F.2d at 221, *quoting*, *Brady* v. *United States*, 397 U.S. 742 (1970).

Because of the solemnity of the act, trial courts in addressing a motion to withdraw must thus consider not only the defendant's claim of innocence but the reason, if any, why a defense now asserted was not advanced initially. When the matter actually has proceeded to trial and the foundations for such a defense have been laid, the reasons for the delay must be even more compelling to overcome the natural and reasonable inference that the decision to enter a plea of guilty was a "tactical" one and the defendant has waived his right to prove his innocence. *United States* v. *Lombardozi*, *supra*, 436 F.2d at 880-881; see *Brady* v. *United States*, *supra*, 397 U.S. at 749. In the present case, as Judge Judd noted in denying the motion to withdraw, appellant had ample opportunity to interpose the claimed entrapment defense at trial.

An extremely cautious inquiry was conducted by the court at the time the guilty plea was entered. That inquiry disclosed that the plea was entered voluntarily, with full knowledge of what was involved and was in no way the result of fear, fraud or ignorance. See *Boykin* v. *Alabama*, 395 U.S. 238 (1969). Almost two days of sworn testimony clearly implicating appellant preceded entry of the plea. Under the circumstances, there seems little question but that the plea was based upon an informed and rational assessment of appellant's plight. Given the failure to offer any sound reason why appellant failed to pursue his claim during trial, the trial court acted well within its discretion in denying the

motion to withdraw. See *United States* v. *Giuliano*, *supra*, 348 F.2d at 222.

Appellant, for the first time in this Court, seeks to set aside the plea on the ground that the trial court's Rule 11 inquiry was "almost mechanical and methodistic" and, in certain respects, contrary to Rule 11 prescriptions. Specifically, appellant claims there was an insufficient factual basis in the record for the plea and that the trial court failed to advise him that he had the right to confront and cross-examine adverse witnesses and the right not to be compelled to incriminate himself. Each of these contentions is devoid of merit.

The Supreme Court in the exercise of its supervisory authority over federal courts, has held that a plea may be set aside and a defendant permitted to plead anew where the district court accepts a plea in violation of Rule 11. *McCarthy* v. *United States*, *supra*, 394 U.S. 459, 464-467; See *Rizzo* v. *United States*, 516 F.2d 789 (2d Cir. 1975). The procedure detailed by Rule 11, by requiring that the court address the defendant personally, is designed to facilitate the trial judge in a determination of the voluntariness of the plea, and the defendant's understanding of the nature of the charge. *Rizzo* v. *United States*, *supra*, 516 F.2d at 798. In addition, the trial judge is required to develop on the record the factual basis for the plea. *United States* v. *Navedo*, 516 F.2d 293, 297 (2d Cir. 1975). *Irizarry* v. *United States*, 508 F.2d 960, 964 (2d Cir. 1974). Whether the court must also advise the defendant of his privilege against self-incrimination and sixth amendment rights to a jury trial and to confront one's accusers is apparently an open issue in this Circuit (See *United States ex rel. Hill* v. *Ternullo*, 510 F.2d 844, 845, n. 1 [2d Cir. 1975]), though clear authority exists to the contrary. *Todd* v. *Lockhart*, 490 F.2d 626, 628, n. 1 (8th Cir. 1974).

In the present case, however, the pleas were taken during trial. Counsel for each of the defendants, in their presence, had already completed a lengthy cross-examination of the government's first witness. Appellant must be assumed to have been aware of what had transpired at trial at the time he entered his plea. *United States* v. *Podell*, 519 F.2d 144 (2d Cir.), *cert. denied*, — U.S. —, 44 U.S.L.W. 3263 (November 3, 1975). Moreover, the court during its preliminary instructions to the jury, once again in the presence of the defendants, indicated that a defendant need not take the stand, a right which appellant apparently had elected to waive, if the opening remarks of his counsel to the jury can be credited. Given the advanced state of the proceedings, it is thus specious to urge that the trial court failed adequately to detail appellant's constitutional rights during the plea allocution. Cf. *United States* v. *Podell*, *supra*, 519 F.2d 144.

The argument that the plea should be vacated because the trial court failed fully to develop on the record a factual basis for the plea is likewise without merit. The requirement that a factual basis for the plea appear on the record is designed to protect a defendant from voluntarily pleading guilty to charges of which he is in fact innocent. *McCarthy* v. *United States*, *supra*, 394 U.S. at 467. Nothing, however, requires that the court rely exclusively on information provided by the defendant; indeed Rule 11 itself, as well as decisional authority in this Circuit, cautions the trial court to satisfy itself that a factual basis exists by independent inquiry before accepting the plea. See *United States* v. *Navedo*, *supra*, 516 F.2d at 297. Here the evidence adduced at trial obviated the need for a more extensive factual inquiry. At the point the plea was entered the trial record amply established defendant's guilt on the first two counts. Appellant's unequivocal admission that he sold cocaine to Agent Blackburn coupled with the record of the trial was more than sufficient to satisfy the court that the

necessary factual foundation existed for the plea.[13] *United States* v. *Podell*, *supra*, 519 F.2d at 149-50. *United States* v. *Navedo*, *supra*, 516 F.2d at 297.

The balance of appellant's contentions relate to his claim, raised for the first time in this Court, that his plea was coerced because it allegedly was entered to "help" his brother Julio Gonzalez, named as a co-defendant on two counts of the indictment. This contention plainly belies the record of the plea proceedings which establishes that appellant, faced with a strong case against him and appreciating that the prospects of acquittal were slight, elected to plead guilty in the hope of a lesser penalty on the remaining counts. (AA 69a).[14]

In point of fact, it was Julio Gonzalez who, during the Court's Rule 11 inquiry, represented that his plea was offered to benefit his brothers Edwin and Ramon, named in four and six counts of the indictment respectively. (AA 83a). But even in the case of Julio Gonzalez that apparent dilemma was obviated by the trial court, when, prior to acceptance of his plea, it refused to reopen the guilty pleas of the other brothers. (AA 120a-121a). Only after Julio indicated in response to inquiry by the court that his plea was predicated on his assessment of the

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[13] The factual basis developed by the district court at the time of Ramon Gonzalez's guilty plea was more complete precisely because, in contradistinction to the events preceding appellant's plea, evidence had yet to be introduced on the fifth and sixth counts of the indictment, the counts on which Ramon's plea was entered.

[14] In response to the judge's questions, appellant stated that no threats prompted his plea, that there were no promises other than those set forth on the record made to induce the plea and that he was in fact guilty of the charges. At the conclusion of the court's inquiry, trial counsel for appellant and counsel for the government represented that there were no other promises made to induce the plea. (AA 70a).

government's case against him, was the plea accepted. (83a-84a). Indeed, immediately prior to sentencing, the trial court denied a subsequent motion on behalf of Julio Gonzalez to withdraw his plea on a finding that of fact that the plea was independent and proper under *North Carolina* v. *Alford*, *supra*, 400 U.S. 25. (AA 122a-123a).

For purposes of this appeal, appellant has thus sought to manufacture a claim of coercion as an additional and independent ground for assailing the trial court's denial of his motion to withdraw his guilty plea. The argument, which enjoys no colorable basis in fact, however, misses its mark since it does not amount to a sufficient allegation of coercion to vitiate the plea absent further proof that the alleged understanding was not fully performed. See, *United States* v. *Carlino*, 400 F.2d 56 (2d Cir. 1968), *cert. denied*, 394 U.S. 1013 (1969) [understanding that charges against son would be dismissed upon entry of plea]; *United States ex rel. Cunningham* v. *Follette*, 397 F.2d 143 (2d Cir. 1968), *cert. denied*, 393 U.S. 1058 (1969) [plea entered ostensibly to help co-defendant]; *Plunkett* v. *C.I.R.*, 465 F.2d 299 (7th Cir. 1972) [agreement that the government would move to dismiss charges against wife on entry of guilty plea]. Here, beyond some vague reference to "serious consequences" (Appellant's Brief at 10), "Julio's circumstances" (Appellant's Brief at 13) and appellant's efforts to " 'save' his brother" (*Id.*), the purported benefits that were to enure to Julio Gonzalez go undefined. It follows quite obviously, that appellant did not plead guilty to help his brother Julio.

POINT II

The sentence imposed on appellant is in all respects proper and the product of the informed discretion of the trial judge.

Appellant finally assails the sentence imposed by the trial judge as excessive and requests that this Court reduce the sentence in the interest of justice. Reasoning that a four year prison term "in many respects, is equal to that imposed upon major narcotics violators" (Appellant's Brief at 16), appellant concludes, in substance, that the sentence resulted from a fixed and mechanical approach in imposing sentence. The claim that a sentence of four years imprisonment imposed concurrently where the maximum penalty on each count is fifteen years plus a fine of $25,000.00 is patently frivolous.

The dispositive principal, only recently restated by the Supreme Court and traditionally followed in this Circuit, is clear: "once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end." *Dorszynski* v. *United States*, 418 U.S. 424, 436 (1974); see also, *United States* v. *Tucker*, 404 U.S. 443, 446 (1972); *United States* v. *Malcolm*, 432 F.2d 809, 814 (2d Cir. 1970); *Woosley* v. *United States*, 478 F.2d 139, 142 (8th Cir. 1973). A sentencing judge thus enjoys broad discretion in imposing any sentence within the limits prescribed by law. *United States* v. *Sweig*, 454 F.2d 181, 183-184 (2d Cir. 1972). Only where that discretion is not exercised at all is a limited review available by an appellate court. *Yates* v. *United States*, 356 U.S. 363, 366-367 (1958).

To insure that the sentence imposed in each instance is the product of an informed discretion, the practice in the Eastern District, and followed here, calls for consultation by the sentencing judge with two

members of the multi-judge sentencing panel prior to the imposition of sentence. *United States* v. *Driscoll*, 496 F.2d 252 (2d Cir. 1974). Though the function of the two other members of the panel consulted by the sentencing judge is purely advisory (*United States* v. *Brown*, 470 F.2d 285, 289 [2d Cir. 1972]), and the responsibility of sentence remains solely that of the trial judge, in the exercise of that function the trial judge enjoys the obvious benefits of collegial advice. In the present case, the other members of the sentencing panel had recommended seven years imprisonment, Judge Judd had considered a sentence of five years imprisonment and the Probation Department had recommended four years imprisonment. (AA 103a). The court settled on the four year term plus five years special parole. *Id.*

Appellant does not contend that the sentencing court was misinformed or otherwise misled as to appellant's background and prior criminal record. Prior to the imposition of sentence appellant's counsel was permitted to review the presentence report with his client and no alleged misstatements were brought to the court's attention. Nor is this Court apprised as to how it is that the trial court failed to exercise its discretion in imposing a sentence which the court itself deemed low. (AA 103a). Beyond reference to appellant's family circumstances and prior criminal record, which the court agreed was not serious, counsel, in mitigation of sentence, simply reasserted the claim that the cocaine was furnished by the informant (AA 101A), a claim which the sentencing court certainly was not obligated to, and apparently did not credit. (AA 101a). The court's express rejection of harsher sentence of less than the statutory maximum hardly bespeaks rigidity in sentencing practices. The sentence imposed could only be the product of the informed discretion of the court, appellant's unsubstantiated claims to the contrary notwithstanding. Under the circumstances, a sen-

tence of four years imprisonment per count to run concurrently is well within the statutory maximum, further appellate review is improper. *Dorszynski* v. *United States*, *supra*, 418 U.S. at 431.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: March 31, 1976

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 31st day of March, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a GOVERNMENT'S APPENDIX of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Arlen S. Yalkut, Esq.
12 Spring Brook Road
Spring Valley, N.Y. 10977

Evelyn Cohen

Sworn to before me this
31st day of Mar. 1976

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1977